

Statement of

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United States Senator
Texas
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U.S. Senate Subcommittee on the Constitution, Civil Rights and Property Rights
U.S. Senator John Cornyn (R-TX), Chairman

Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?

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OPENING STATEMENT

Our hearing this morning is entitled: "Judicial Activism vs. Democracy: What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?" In light of recent events, this hearing is both timely and necessary.

An on-going national conversation about the importance of marriage intensified recently when four Massachusetts judges declared traditional marriage a "stain" on our laws that must be "eradicated." Since then, Americans have witnessed startling and lawless developments nationwide - from Boston to San Francisco, and numerous points between.

Those who saw our hearing in September know that today's debate over marriage was actually sparked last June, when the U.S. Supreme Court issued its controversial ruling in *Lawrence v. Texas*. In the hands of activist judges like those in Massachusetts, California, and elsewhere, part of the rationale adopted in *Lawrence*, one completely unnecessary to reach the result, presents a serious threat to traditional marriage laws across the nation. That's not just my conclusion - it's the conclusion of legal experts, constitutional scholars, and Supreme Court observers across the political spectrum.

It's important to note at the outset: The American people didn't initiate this discussion, nor did members of Congress of either party. Let's be clear and honest about this. The only reason we are discussing this issue today is the work of aggressive lawyers, and a handful of activist judges.

Across diverse civilizations, religions and cultures, humankind has consistently recognized the institution of marriage as society's bedrock institution. After all, as a matter of biology, only the union of a man and a woman can reproduce children. And as a matter of common sense, confirmed by social science, the union of mother and father is the optimal, most stable foundation for the family and for raising children.

Unsurprisingly, then, traditional marriage has always been the law in all 50 states. At the national level, overwhelming congressional majorities - representing over three-fourths of each chamber - joined President Clinton in codifying a federal definition of marriage by enacting the bipartisan Defense of Marriage Act of 1996.

In light of this extraordinary consensus, it is offensive for anyone to charge supporters of traditional marriage with bigotry. Yet that is exactly what activist judges are doing today: accusing ordinary Americans of intolerance, while abolishing American traditions by judicial fiat.

Renegade judges (and some local officials) are attempting to radically redefine marriage. Marriage laws have already been flouted in Massachusetts, California, New Mexico, and New York. Lawsuits seeking the same result have also been filed in Nebraska, Florida, Indiana, Iowa, Utah, Georgia, Arizona, Alaska, Hawaii, New Jersey, Connecticut, and Vermont, as well as my home state of Texas.

Disregarding the democratic process, four judges in Massachusetts concluded that the "deep-seated religious, moral, and ethical convictions" underlying traditional marriage are "no rational reason" for the institution's continued existence. They contended that traditional marriage is "rooted in persistent prejudices" and "invidious discrimination," and not the best interest of children. They even suggested abolishing marriage outright, stating that "if the Legislature were to jettison the term 'marriage' altogether, it might well be rational and permissible."

Apologists for the Massachusetts court lamely contend that democracy and marriage can be restored in that state. But not until 2006 - and only through a process citizens shouldn't have to endure just to preserve current law. Moreover, the problem is not limited to Massachusetts. In California, courts have refused to enforce that state's law defining marriage as between a man and a woman, against a lawless mayor. New Mexico, New York, and Illinois officials have followed. And just this morning, I've read that officials in Oregon are going to join this trend.

Defenders of marriage and democracy alike recognize that this is a serious problem - and indeed a national problem, requiring a national solution.

Congress recognized the national importance of marriage in 1996 by codifying a federal definition of marriage. And most officials on both sides of the aisle continue to express their support for traditional marriage. But words are not enough to combat judicial defiance. If elected representatives are to retain their relevance in a democracy - indeed, if we are to remain faithful to our national creed of government of the people, by the people, and for the people - words must be joined by action.

True, the Constitution should not be amended casually. But serious people have reluctantly recognized that an amendment may be the only way to ensure survival of traditional marriage in America. Why is an amendment necessary? Two words: activist judges.

Legal experts across the political spectrum agree the Lawrence decision presents a federal judicial threat to marriage. Harvard Law Professor Laurence Tribe has said, "you'd have to be tone deaf not to get the message" that Lawrence renders traditional marriage "constitutionally suspect." According to Tribe, the defense of marriage is now a "federal constitutional issue," and he predicts the U.S. Supreme Court will eventually reach the same conclusion as the Massachusetts court.

Tribe's predictions are confirmed, of course, by the Massachusetts ruling, which not only invalidated that state's marriage law, but also suggested that Lawrence might be used to threaten laws across the country - including the federal Defense of Marriage Act. Tribe is also joined by members of Congress who argue that federal law is "unconstitutional."

Moreover, constitutional scholars predict that Nebraska - which has approved a state constitutional amendment defending marriage - may soon see that amendment invalidated on federal constitutional grounds in a pending federal lawsuit. Another federal suit has been filed in Utah to establish a federal constitutional right to polygamy under Lawrence.

The only way to save laws deemed "unconstitutional" by activist judges is a constitutional amendment. Indeed, we have ratified numerous amendments as a democratic response to judicial decisions before - including the Eleventh, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

I want to close by emphasizing that this discussion must be conducted in a manner worthy of our country. It should be bipartisan, and it should be respectful.

The defense of traditional marriage has been a bipartisan issue in the past. I hope it will continue to be a bipartisan issue. It was a Democrat who, during the last Congress, first proposed a federal constitutional amendment to protect marriage. And as we will see today, our panel is comprised of traditional marriage supporters who transcend party lines.

The discussion must also be respectful. I have often said that Americans instinctively and laudably support two fundamental propositions: that every individual is worthy of respect, and that the traditional institution of marriage is worthy of protection.

Throughout the nation, children are being raised in nontraditional environments - by foster parents, by single parents, by grandparents, uncles and aunts. We will hear more about that this morning. We know they are doing the best job they can. We can respect the hard work that they are doing, while at the same time still adhering to the dream that we have for every child - which is a mother and a father in an intact family.

In 1996, Senator Kennedy pointed out that "there are strongly held religious, ethical, moral beliefs that are different from mine with regards to the issue of same-sex marriage which I respect and which are no indications of intolerance." I hope that that spirit continues today. Millions of Americans who support the traditional institution of marriage should not be slandered as intolerant. The institution of marriage was not created to discriminate or oppress - it was established to protect and nurture children.